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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~107~~

STANDARD OIL COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF FOR PETITIONER.

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December 17, 1949.

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BRIEF FOR PETITIONER.

DECISIONS BELOW.

The opinion and decree of the Court of Appeals for the Seventh Circuit issued March 11, 1949 (R. 5293), 173 F. 2d 210. The final order of the Federal Trade Commission was entered August 9, 1946 (R. 5254), 43 F. T. C. 56.

JURISDICTION TO REVIEW.

Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1254(1). Certiorari was granted herein November 7, 1949.

STATUTE INVOLVED.

Sections 2 (a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act (Act of October 15, 1914, as amended by Act of June 19, 1936, 49 Stat. 1526; 15 U. S. C., sec. 13), attached as Appendix B, pp. ii.

STATEMENT OF THE CASE.

The complaint in this case challenged the right of petitioner under the Robinson-Patman Act to sell its gasoline to its four jobber customers in Detroit* at 1½¢ per gallon less than it sold to its service station customers in the same area (R. 2, 34). Petitioner defended on the ground that it made the lower price in order to retain the four jobbers as customers and to meet in good faith equally low prices offered them by competitors (R. 17-22). It was also contended that "the purchases involved" were not "in commerce" (R. 5-8). The farther defense of cost justification was not pursued in the court below and is therefore eliminated.

* Citrin-Kolb Oil Company, Stikeman Oil Company, Wayne Oil Company, Ned's Auto Supply Company.

THE FACTS.

With few exceptions, all the material facts in this case are contained in the Commission's Findings of Fact (R. 5161-82) or, if not mentioned by the Commission, in the Trial Examiner's Report (R. 5047-128).

During the period 1936 to 1940 petitioner, a producer and refiner with principal office at Chicago, was engaged in distributing petroleum and related products in 14 Middle West States (R. 5163). It did not produce or refine in Michigan; its business there consisted solely of distribution (R. 5162-3). This case concerns exclusively petitioner's sale of gasoline in the region of Detroit, Michigan, to two classes of customers: (a) to approximately 358 independent retail service stations buying in tank wagon quantities; and (b) to the four jobbers buying in larger tank car quantities.

Petitioner sold to all its service station customers at the same price—*i. e.*, the tank wagon price (R. 5058, 131, 161).* The deliveries made by tank wagon to these service stations averaged 700 to 800 gallons (R. 112).

Petitioner sold to all its jobber customers at the same price—*i. e.*, the tank car price. These four jobbers, who during the period involved were petitioner's only jobber customers in Detroit, purchased at the tank car price, which (in the case of Red Crown** gasoline) was 1½¢ less

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* During the early part of the period 1936-1940, there were 18 months when Ned's (before it became a jobber) purchased at ½¢ below the tank wagon price (R. 5168) for reasons appearing below.

** Red Crown constituted 90% of petitioner's sales in Detroit, Stanolind constituted 3 to 4%, and Solite with Ethyl 7 to 10% (R. 5162). The prices of Stanolind and Solite with Ethyl as well as the tank car differential differed somewhat from the price of Red Crown (R. 5061).

than the tank wagon price (R. 5061). The deliveries made in tank car loads (or equivalent transport truck loads) to these jobbers averaged 8,000 to 12,000 gallons (R. 122).

Petitioner did not attempt to control the resale prices of its jobber customers (R. 197-9) nor did it attempt to control the prices at which its service station customers resold gasoline (R. 196-7).

Citrin, Wayne and Stikeman during 1936-40 and Ned's during 1938-40 "under industry practice and contemplation were bona fide jobbers" (R. 5098) because each of them maintained sufficient bulk storage to take delivery in tank car quantities, owned and operated tank wagons and other facilities for delivery to service stations, had an established business sufficient to insure purchases of from one to two million gallons a year, and had adequate credit responsibility (R. 5096-7-8), notwithstanding the fact that Ned's resold entirely at its own service stations to the consuming public and that the other three resold in part in the same way.* The Trial Examiner found that three of them met the definition of "jobber" contained in the N. R. A. Code for Marketing Refined Petroleum Products approved by the Federal Trade Commission and were registered in the State of Michigan as jobbers prior to the passage of the Robinson-Patman Act (R. 5097-8)—

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* Wayne in 1936, 1937 and 1938 sold all gasoline at wholesale but in 1939 it sold 7.6% and in 1940 14.2% at retail stations operated by it temporarily until suitable tenants could be found (R. 5059-60). Stikeman was withdrawing from the operation of its own service stations and since 1938 sold entirely at wholesale (R. 5060). Citrin, also withdrawing from the operation of its own stations, sold at retail 15% in 1937 and 6.5% in 1940 (R. 5060). Ned's sold substantially all its gasoline through the service stations owned and operated by it—4 in 1936, 6 in 1937 (R. 5059). See also table at R. 5122.

Ned's was recognized as a jobber in 1938.* The Commission in its Findings of Fact, not denying the established industry practice, held that the classification of these four as jobbers was "arbitrary" because "there was no requirement that the said jobbers should sell only at wholesale" (R. 5166-7-8).

During the period 1936-40 Michigan was one of the most highly competitive gasoline marketing areas in the country. This was due in part to the fact that of the total Michigan gasoline consumption, which can be taken at 1,100,000,000 gallons annually, approximately 333,000,000 gallons were refined annually in Michigan from oil produced from Michigan wells (R. 1380); of the 25 Michigan refineries 2 were operated by major companies and 23 by non-major companies (Res. Ex. 24, R. 4826). So-called non-major brand gasolines, which did not have the same public acceptance as major brands, had always been marketed at a differential below major brands of about 2¢ per gallon. When this differential exceeded 2¢ such non-major brand gasolines became increasingly competitive and seriously affected the marketability of major brands (R. 5108, 1787, 327, 2113). In 1938 service stations in Detroit were selling non-major brands at from 3¢ to 6¢ a gallon below the prevailing retail price of petitioner's gasolines (R. 1907) and Michigan refineries were offering Michigan gasoline to jobbers at 3¢ below the prevailing tank wagon price of major brands (R. 1908).

During the period there were 10,000 to 12,000 jobbers in the United States (R. 5249, 93[illegible]40) of which approximately

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*Throughout this brief we shall not use the word "dealer" which is ambiguous.

The word "jobber" shall apply to one who conforms to the industry classification of jobber and who therefore may resell at wholesale, retail or both.

The word "wholesaler" shall apply to one who resells only at wholesale.

130 were licensed in Wayne County in which Detroit is located (Res. Ex. 26 B-D, R. 4857-9). There were about 200,000 service stations in the country* of which 3,000-4,000 were located in Detroit (R. 5062) and of which petitioner and its jobbers supplied 452-463 (Com. Ex. 128-A, R. 4786). There were 20 so-called major oil companies in the United States** of which 16 were operating in Michigan*** and 9 in the Detroit area (R. 5106).

Total gallonage sold in the Detroit area by all companies aggregated from about 363,735,380 gallons to 460,664,890 gallons annually, of which petitioner's sales totaled from approximately 60,000,000 gallons to 75,000,000 gallons annually (Res. Ex. 58, R. 4879) constituting 16.2% to 17.4%. Petitioner's sales to its four jobbers ran from 8,095,972 gallons to 14,954,638 gallons annually (idem). Total sales of major-brand gasoline to jobbers in the Detroit area in 1940 were 103,783,982 gallons while the sales of non-major brands to licensed jobbers in 1940 amounted to 64,716,210 gallons (Res. Ex. 57-A&R, R. 4877-8; Res. Ex. 58, R. 4879).

Methods of distribution in the oil industry differ in different communities; for example, some suppliers of gasoline "do not sell to jobbers in fields in which they sell direct to the retail trade" (R. 5126-7, 1622, 945-6); others sell only to jobbers (or wholesalers) in a given field (R. 971, 1075, 1092-3); and others, as petitioner, sell both to jobbers and retailers in some fields (R. 5127, 971, 1020, 1622).

Relative to meeting competitors' prices.

The Trial Examiner affirmatively found that the tank car price accorded to the four jobbers, and the ½¢ discount accorded Ned's from 1936-8, were made in each instance

* TNEC Monograph, 1941, No. 39, p. 41.

** Idem p. 3.

*** Idem p. 94.

to meet equally low prices repeatedly offered them by petitioner's competitors and that petitioner had to meet the competitors' prices to retain them as customers (R. 5096, 5104, 5122). He held as a matter of law that, had injury to competition not resulted therefrom, the granting of the lower price to them would have been lawful (R. 5096, 5105). He found that the effect of petitioner's lower price to Ned's and the four jobbers "was," "tended" and "may be" to substantially lessen competition with them and their customers (R. 5125-6) because of which, he held, the granting of the lower price was unlawful.

The Commission accepted the Examiner's novel Conclusions of Law but did not overturn his Finding of Fact that petitioner's lower price was made for the purpose of retaining the jobbers as customers and to meet equally low prices of competitors (R. 5178-82). The court below said there is "substantial evidence in this record" of petitioner's good faith in this respect "and we think it may be assumed to be conclusive" (R. 5297; see also 5299, 5302).

The record shows many specific instances where petitioner's competitors tried to win these jobbers by lower quotations for gasoline of like grade and quality. Each competitive offer was actually reported to petitioner. Petitioner's tank car prices allowed the jobbers were not as low as many of the competitive offers, and never lower. That these jobbers could have purchased comparable grades of gasoline at lower prices from many other sources and that petitioner could not have retained them as customers without allowing them the tank car price is indisputable (R. 5099-104, 1893, 1062-3, 1086, 1092, 1988-91, 1996-2014) and doubtless explains the Commission's inability to make a contrary finding.

Relative to effect on competition.

Ned's, which had been a price cutter for at least 15 years (R. 504-5), continued during 1936-40 to sell to the public at times below the prevailing retail service station prices and to accord discounts and premiums amounting to 1¢ to 2¢ a gallon off the prevailing service station price (R. 5169). Citrin in 1938 or 1939 gave discount cards to purchasers of gasoline at one of its service stations entitling the holder to a discount of 2¢ a gallon on Red Crown (R. 5170). Wayne and Stikeman did not allow any discounts or rebates to the public at the few service stations operated by them; nor did they sell at wholesale to their service station customers at less than petitioner's posted tank wagon price: *i. e.*, the price petitioner sold to its retailer customers (R. 5166-7, 5108).

Citrin from January 1, 1938, to December 31, 1940, sold a million gallons annually at wholesale to Langer-Cohn, an operator of service stations, at 1¢ a gallon less than petitioner's posted tank wagon price and smaller quantities to another retailer-customer at ½¢ less (R. 5166, 5171). Langer-Cohn at its few service stations at times resold to the consuming public at as much as 2¢ a gallon less than the prevailing service station price (R. 5171).

During the period 1936 to November, 1939, competition among service stations in Detroit was keen. Price cutting was common practice. The Trial Examiner pointed out that in the latter part of 1936 and early 1937 major brand gasolines were sold at some retail service stations below the then prevailing retail price by three large tank car customers of companies other than petitioner, by one large retailer not supplied by petitioner, by several small dealers not supplied by petitioner and by Ned's (R. 5113). Price cutting by other stations followed and increased progressively until January, 1939, when it subsided for

a while, started again, and finally ended in November, 1939 (R. 5113-4). There was evidence that neither Ned's nor Citrin had initiated such price cutting but had merely attempted to meet in part the discounts offered by other retail service stations competitive with theirs (R. 5112, 1843-59, 907-15, 1628-45, 1652-85). The court (R. 5296) and the Commission (R. 5170) said that Ned's had been responsible for retail price cutting in major brand gasolines over a period of several years and thereby injured competition.

The Commission held that the service station operator's margin is represented by the difference between the tank wagon price which he pays and the consumer price which he receives. This margin varied from time to time but was found to have been 3.3¢ a gallon after November 19, 1939, on the principal brands of major companies (R. 5169), all of which are of substantially equal quality in the public mind (R. 5107, 325). The Commission found that the ½¢ lower price made to Ned's from 1936 to 1938 and the 1½¢ lower price made to the four jobbers constituted a competitive advantage injuring and lessening competition with them and with their respective customers (R. 5170).

The Commission called fifteen operators of Detroit service stations who testified that they had experienced price competition with Ned's, Citrin and Langer-Cohn and had lost customers to them, particularly during 1938 (R. 5114-5, 407-548, 575-98).

Harrison, a Commission witness, testified that if "all" major companies had refused to sell to retail operators at tank car prices "it would improve the competitive situation in Detroit" (R. 345); that the desire of a marketer enjoying a preferential price to expand frequently leads to price cutting (R. 343). Clark, Professor of Marketing at Northwestern University, a witness for petitioner, testified that jobbers perform definite economic functions (R.

1012, 13); that the jobber method is "necessary from the point of view of economy and service to retailers and consumer" (R. 1015); that it "leads to more economical distribution" (R. 1019) and more competition (R. 1023); "Without the jobber you would have a very much smaller number of competitors in the field" (R. 1020); and that distribution through different types (retailer, wholesaler, jobber) fosters competition in price and service (R. 5119-20, 1022-3, 1043, 1047).

Relative to "purchases in commerce."

All of the gasoline sold by petitioner in Detroit was shipped from its Whiting, Indiana, refinery over the Great Lakes by its lake tankers to its Marine Terminal located at River Rouge, Michigan, where such gasoline came to rest and was commingled with other gasoline of the same grade previously stored there over a period of time (R. 5163, 99-100, 186). Approximately half of the gasoline stored at the Terminal was delivered to jobber and service station customers of petitioner and the rest to its consumer customers (Com. Ex. 87, R. 4776). No gasoline in the Terminal was transported out of the state; all was destined for sale and delivery entirely in Michigan; and all was in fact sold and delivered entirely in Michigan (R. 188).

The Marine Terminal consisted of a tract of land on which was located sufficient tankage to store at one time 63,000,000 gallons of gasoline, together with suitable equipment and an office building to house the Terminal management and clerical help (R. 5163, 5057, 5063). The manager of the Terminal was paid from Chicago, was under general supervision of the Manufacturing Department of the Chicago office, and was entirely independent of the Detroit Division Office (R. 5063-4).

The Detroit Division Office had supervision of all sales in

the Detroit field (R. 5057, 5063). It had approximately 450 employees under its jurisdiction, including office personnel, salesmen, truck drivers, stock men, and employees at the local bulk plants. The activities of all employees were confined to the State of Michigan. They were hired and paid by the Detroit Office and the records of their employment were kept in that office (R. 5063, 183-5, 189-90). The manager of the Detroit Division Office was under the general supervision of the Sales Department of the Chicago Office (R. 5063).

Purchases by Petitioner's Service Station Customers. Leasing negotiations for the 200 retail service station properties which petitioner owned and leased to independent operators and for the 8 service stations which petitioner leased and subleased to independent operators were originated, conducted and concluded entirely in Detroit on blank forms approved by the Chicago Office. The executed leases were retained as records of the Detroit Office (R. 5058, 190-1). The leases did not require the operators to handle petitioner's gasoline (R. 5164, 5058, Com. Ex. 1-A, R. 4702), but, with the exception of a few who handled Ford Benzol (R. 222, 467), they generally handled no other brand. There was no contract or arrangement for the purchase or sale of gasoline between petitioner and such operators either in the written lease or otherwise (R. 162).

Written contracts, usually for one year, were entered into between petitioner's Detroit Office and the 150 independent service stations which did not lease or sublease from petitioner (R. 5164, 5058). These contracts outlined the terms under which the station operators bought and petitioner sold petitioner's brands of gasoline (R. 5058, Com. Ex. 2, R. 4713); the operators were not committed to purchase any definite amount nor were they prohibited from dealing in products of others.

New accounts were solicited, contracts or leases were entered into, advertising was installed, orders were taken and tank wagon deliveries were made to these customers, all by employees of the Detroit Office (R. 189-91). All sales, contracts and leases were consummated in Michigan and negotiations were handled without referral to the Chicago Office (R. 190-1). The Detroit Office maintained and operated six bulk storage plants strategically located in Detroit which were periodically supplied with gasoline from the Marine Terminal by tank cars operated by independent common carriers (R. 5063, 114) under carrier contracts entered into in Chicago (R. 5064). These shipments from the Marine Terminal to bulk plants were made without reference to specific orders or contracts (R. 188) and gasoline thus delivered was commingled with gasoline of like grade previously stored there (R. 188). Each bulk plant was operated by a salaried or commission employee of the Detroit Office (R. 184).

Petitioner owned and operated approximately sixty tank wagons to deliver gasoline from the bulk plants to service stations in Detroit (R. 121, 2). Orders from service stations were taken by salesmen, by tank wagon drivers on regular routes making periodical calls, or were transmitted direct to the Detroit Office (R. 191). Orders were relayed to the bulk plants, whence the gasoline was transported by Company owned tank wagons and unloaded into the service station tanks (R. 110, 187). The drivers on delivery made out "tickets" or bills for the gallonage, which bills, together with the cash or credit collected, were returned to the proper bulk plant. The clerk in the bulk plant transmitted a report together with the money and "tickets" to the Detroit Office. The money was deposited in a Detroit bank and the "tickets" remained as permanent records of the Detroit Office (R. 5064, 192). On completion of sale, the gasoline delivered became the purchaser's absolute

property and petitioner neither attempted to exercise nor in fact exercised any control over the disposition thereof (R. 196-7).

Purchases by Petitioner's Jobber Customers. Citrin, Wayne and Stikeman, and Ned's after 1938, maintained and operated one or more bulk plants from which they delivered gasoline by their own tank wagons to customers and to their own service stations (R. 5058-9). Petitioner shipped gasoline from the Marine Terminal to the bulk plants of these jobbers by tank car.* Petitioner and the jobbers were free to terminate the relationship at any time, the jobbers were on a day to day basis (R. 5058-9, 116). The jobbers were not spot market buyers and, except for Ford Benzol, handled only petitioner's gasoline (R. 2086-7).

When a jobber wanted gasoline he called the order clerk in petitioner's Detroit Office who made up an order and transmitted it to the Marine Terminal. After delivery by tank car to the jobber's bulk storage plant, the Detroit Office made out an invoice and mailed it to the jobber. The money remitted was placed in a Detroit bank and a copy of the invoice was kept in the Detroit Office as a permanent record of the transaction (R. 192-3). Gasoline so delivered became the jobber's absolute property and petitioner neither attempted to nor in fact did exercise there-

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* During the years 1936-40, six tank cars of gasoline were shipped direct from Whiting to the jobbers during the period March 31 to April 10, 1939 (R. 122, Com. Ex. 5-A to J, R. 4717-26). Such a nonrecurrent, sporadic instance, not in the regular course of a business, does not affect the outcome of this case (*Daly* v. *Citrin*, 1943, Dist. Ct., E. Dist. Mich., 53 F. Supp. 876, 878, 879; *Urban* v. *Victory Naval Uniform Co.*, 1947, Dist. Ct., Dist. Mass., 71 F. Supp. 270; *Semble, Mabee* v. *White Plains Publishing Co.*, 1946, 327 U. S. 178, 181, and *Phillips* v. *Meeker Co-operative Light & Power Ass'n*, 1945, Dist. Ct., Dist. Minn., 63 F. Supp. 733).

after any control over its disposition or resale price (R. 198).

The Marine Terminal. Shipments of gasoline were made from petitioner's Whiting refinery to the Marine Terminal, without reference to any specific orders or contracts (R. 188), in contemplation of ultimate resale to present or prospective customers not only in Detroit but in the whole Detroit region (R. 5163, 5062). No shipment unloaded at the Marine Terminal was earmarked for or destined to any particular customer (R. 186) although of course the varying requirements of existing jobbers, service stations and commercial and other users could be estimated on a general over-all basis because of past experience (R. 5163, 207-8). Shipments were made during the summer months, sometimes weekly or twice weekly (R. 5163), and the Terminal tanks were filled to capacity in the summer and fall to take care of withdrawals in the late winter months when lake navigation was closed to tankers (R. 186, 207). The inventory of commingled gasoline in the Terminal tanks may have been put there from time to time over a period of months (R. 188).

Petitioner paid taxes to the State of Michigan on its Michigan real estate and personal property; on its land, equipment and facilities at the Marine Terminal, its bulk plants, its leased-out service stations, and its Detroit Office. It paid Michigan sales taxes where due. It paid Michigan personal property taxes on its inventories of gasoline at the Marine Terminal and bulk plants (R. 5064, 194-6).

THE ORDER OF THE COMMISSION.

Paragraph 5 of the Modified Order to Cease and Desist (R. 5256) prohibits petitioner from "allowing a price to any * * * jobber * * * on such gasoline sold by such * * * jobber * * * at retail lower than the price which" petitioner "charges its retailer-customers who in fact compete in the sale and distribution of such gasoline with such * * * jobbers * * * in their retailing capacity." This was designed to reach the jobbers in their *retailing* capacity.

Paragraph 6 was designed to reach the jobbers in their *wholesaling* capacity. It forbade petitioner to sell gasoline to any jobber at the tank car price where such jobber resells such gasoline to any retailer-customer at less than petitioner's posted tank wagon price to its retailer-customers—their respective retailer-customers being in competition with each other.

The Commission held that it was immaterial whether or not petitioner in making the tank car price to the jobbers had acted in good faith to retain them as customers and in order to meet an equally low price of a competitor (R. 5299, 5179). It held that "the defense of meeting an equally low price of a competitor, as provided by subsection (b) of section 2, is not available to" a seller (R. 5182) whenever the effect is deemed injurious to competition.

The Commission did not hold or find in *haec verba* or by necessary intendment that "either or any of the purchases involved in such discrimination are in commerce."

JUDGMENT OF THE COURT BELOW.

On review, the court modified Paragraph 6 of the Commission's Order, and entered its judgment enforcing the Order as modified (R. 5307).

SPECIFICATION OF ERRORS.

The court below erred in sustaining the Commission's Order and enforcing it as modified in that: (1) petitioner's showing that its lower price was made in good faith to meet an equally low price of a competitor constituted a complete defense; (2) Section 2(b), as construed by the court below, does not meet the constitutional requirements of definiteness and reasonableness; (3) Paragraph 6 of the Commission's Order as modified imposes prohibitions forbidden by the antitrust laws and unauthorized by the Clayton Act as amended; and (4) the purchases involved in the alleged discrimination were not in commerce.

SUMMARY OF ARGUMENT.

I. Section 2(b) by unmistakable language accords to a seller charged with price discrimination the right of "showing that his lower price was made in good faith to meet an equally low price of a competitor." This good faith showing has always been regarded as a complete defense to a charge of price discrimination—the Commission has always so regarded it except in the instant case (*infra*, p. 28); the Department of Justice has always so regarded it and recently publicly reiterated its position (*infra*, p. 32).

This Court, examining the language of Section 2(b) in the light of its context and legislative history for the purpose of determining the amount and quality of evidence necessary to establish good faith in meeting an equally low price of a competitor, has indicated that the good faith showing when adequately established will be a complete defense (*Staley, Morton Salt* and other cases, *infra*, p. 21). If, as held below, the defense is not available when there have been effects at the retail level deemed injurious to competition, then the defense will never be available in any price discrimination case and the proviso to Section 2(b) will be completely meaningless (*idem*).

II. The construction of Section 2(b) adopted by the court below renders its meaning so vague and its application so arbitrary as to raise serious constitutional questions which should be avoided by adopting the natural and plain meaning for which we contend.

Realizing that the court's interpretation of the proviso to Section 2(b) renders it entirely nugatory, the Commission now asserts in answer to Congressional inquiries that the defense will be available except in "rare," but entirely undefined, instances which cannot be identified (*infra*, p. 37).

Denial of the right in good faith to meet an equally low price of a competitor would render the statute constitutionally unreasonable and arbitrary, particularly where, as in the instant case, the effect is to transfer patronage from the seller to the competitor whose price the seller is forbidden to meet without in any way altering the competitive situation for the better (*infra*, p. 40). Furthermore, as shown in Point III, the effect of this construction in this case will merely be to restrict distribution by a supplier through retailers and jobbers in the same territory—a result which will actually lessen competition without eliminating any evils contemplated by the statute (*infra*, p. 43).

III. Paragraph 6 of the Commission's Order as modified, under which petitioner's jobbers may continue as wholesalers to purchase from petitioner at the tank car price provided they maintain petitioner's tank wagon price in the territory, is unreasonable and unlawful (*infra*, p. 46). Paragraph 6 will cause either the establishment of resale price programs by methods hitherto considered unlawful and uneconomic (*infra*, p. 46) or the unwarranted harassment and even liquidation of jobbers and retailers (*infra*, p. 47).

IV. The Commission was without jurisdiction of this case in any event unless "either or any of the purchases" of gasoline by the four jobbers or the 358 service stations served by petitioner was "in commerce" (*infra*, p. 50). All the gasoline sold in the Detroit area was delivered out of storage at a marine terminal located at River Rouge within the State of Michigan. Interstate aspects of transportation ended at the Marine Terminal and subsequent distribution from the Terminal solely within the State of Michigan was in local commerce beyond the purview of the Robinson-Patman Act (*idem*). The instant case is analogous to the *Jacksonville Paper* case, not to *Stafford* v. *Wallace* or *Swift* v. *United States* (*infra*, p. 51). The Commission did not find, although attention was called to the omission by the dissenting Commissioner, that "either or any of the purchases involved" in this case was "in commerce."

ARGUMENT.

I.

Meeting in good faith an equally low price of a competitor constitutes a complete defense under the proviso to Section 2(b).

The affirmative proof of meeting in good faith the equally low prices of competitors should have been held controlling in this case in view of the explicit language of Section 2(b), the decisions of this Court, and the basic principles involved.

Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act (Appendix B, p. ii), skeletonized and emphasized, provides as follows:

> "* * * Upon proof being made * * * that there has been discrimination in price * * *, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with the violation of this Section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination;
>
> "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *."

The use of the words "*rebutting the prima-facie case thus made by showing,*" preceding the proviso, and the use of exactly the same words in the proviso gives the two parallel provisions a parallel function and, so read, makes the meaning of the Section clear and unambiguous. These words preceding the proviso unquestionably have this meaning: The seller, proved to have made discriminations in price, may

rebut "*the prima-facie case thus made by showing* justification," and such showing, when made, admittedly constitutes a complete defense. These same words in the proviso must be given the same meaning: The seller, proved to have made discriminations in price, may rebut "*the prima-facie case thus made by showing* that his lower price was made in good faith to meet an equally low price of a competitor," and such showing, when made, must likewise be held to constitute a complete defense.

Furthermore, after discrimination in price has been proved, the Commission is authorized to issue an order "unless justification shall be affirmatively shown" by the seller, "Provided, however, That *nothing* herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price" etc. If "*nothing* contained" in the Act is to prevent a seller from showing the good faith meeting of a competitor's equally low price, surely the showing when made is to have a controlling effect on the outcome of the case. It is significant that the phrase "Provided, however, That nothing herein contained shall prevent" etc. is used in three of the four provisos to Section 2(a) and in each instance that which is designated as not "prevented" is specifically made lawful.

The court below admitted that petitioner "had a right to make [the discrimination in price] as against its [own] competitors" (R. 5302); which means that the good faith showing was a complete defense in so far as the discrimination adversely affected petitioner's competitors. But the court held that the good faith showing was not a full defense apparently because the discrimination adversely affected certain retailers: first, retailers who were competing with the jobbers in their retail activity, *e. g.*, retailers competing with Ned's, and second, retailers who were competing with retail customers of the jobbers, *e. g.*, retailers competing with Langer-Cohn. The language of Section

2(b) affords no logical basis for granting the right "as against its [own] competitors" and withdrawing it as against anybody else.

Furthermore, this interpretation of Section 2(b) renders it empty and meaningless. A seller's right to make discriminations in good faith in order to meet the lower price of a competitor is worthless if it exists only as against the seller's own competitors, that is, only excuses effects on competition at the seller's level. A discrimination in price to meet an equally low price of a competitor is always made to a purchaser and always gives one purchaser a price advantage over some other purchaser. This is true whether the discrimination is made in good faith between purchasers who are competing manufacturers, competing retailers or competing wholesalers. This price advantage accorded to one purchaser and withheld from another purchaser in competition with the first constitutes the injury to competition at the purchaser's level, which inheres in every price discrimination (*Morton Salt*, 1948, 334 U. S. 37, 46, 50). It is also obvious that a discrimination in price made in good faith to a wholesaler to meet an equally low price of a competitor affords such wholesaler a price advantage which he "may" pass on to his retailer customers with resultant injury at the retail level. The lower court's holding that the good faith defense is unavailable whenever there is injury to competition at the retail level or at a level other than the seller's renders the defense unavailable in every price discrimination case.

The court's interpretation of the proviso to Section 2(b), which renders it futile in every price discrimination case, is in direct conflict with the language of *Federal Trade Commission* v. *Staley Manufacturing Co.*, 1945, 324 U. S.

746, and its companion case, *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 1945, 324 U. S. 726. In the *Staley* case this Court held that the system of pricing there under review constituted price discrimination which resulted in injury to competition among those who purchased glucose from suppliers and used it in subsequent manufacture. The Court then considered the affirmative defense proffered under the proviso to Section 2(b) and said (p. 750):

> "The sole question we find it necessary to discuss here is whether respondents have succeeded in justifying the discriminations by an adequate showing that the discriminations were made 'in good faith' to meet equally low prices of competitors."

The Court in the *Staley* case (pp. 750-60) reviewed and discussed the evidence having to do with this defense and finally held that the showing was "inadequate" inasmuch as specific offers by specific competing suppliers to specific customers had not been proved. This long discussion would have been entirely academic and unnecessary had injury to competition at any level been sufficient to override the defense.

Mr. Chief Justice Stone compared Section 2 of the Clayton Act as amended by the Robinson-Patman Act with Section 2 prior to the amendment (see Appendix A, p. i). The old section was generally interpreted to mean that a seller could make discriminations in price "in the same or different communities to meet competition" other than price competition, *e. g.*, better service or other advantages not capable of exact measurement in dollars and cents. This enabled a seller to undercut the price of a competitor to meet the competitor's better service or public acceptance. It was generally thought that the defense was so general that it would be available in the vast majority of price discrimination cases; it was also generally thought that "meet-

ing competition" under the old Act enabled one not alone to meet but to beat competitors' prices. The Chief Justice thus summarized the change of language, at p. 752:

> "It will be noted that the defense that the price discriminations were made in order to meet competition, is under the statute a matter of 'rebutting' the Commission's 'prima facie case.' Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6-7; see also the statement of Representative Utterbach, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418."

The court below quotes this excerpt from the opinion and, we submit, misinterprets it (R. 5301-2). This excerpt, when read with the whole opinion, plainly means that the Robinson-Patman amendment makes "the defense a matter of evidence, in each case," *e. g.*:

> (a) was the lower price made in good faith to meet an equally low price of a competitor or merely to meet a general system of competition (p. 753);
>
> (b) was the lower price made in good faith to meet mere vague rumors of an equally low price offered by a competitor which would not "lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a *competitor*" (pp. 759-60);
>
> (c) was the lower price made in good faith in self defense to retain a customer or was it made in bad faith to drive the competitor out of business;
>
> (d) did the competitor's offer concern goods of comparable grade and quality;
>
> (e) was the purpose to meet an equally low price of a competitor or was it made in combination with others

to lessen competition or to create a monopoly (*Cement Institute* case, *infra*); or

(f) were predatory practices or other factors involved which indicate that the action was not taken in good faith but on the contrary in bad faith?

But when the good faith showing, etc. has been made out under the proviso to 2(b) the opinion in the *Staley* case makes it plain that the showing constitutes a complete defense.

Throughout the *Staley* opinion Mr. Chief Justice Stone uses the words "justify", "justifying", "justification", twelve times*. Occasionally he says in the words of the statute that a respondent has the burden of justifying the discrimination by showing that his lower price was made in good faith to meet a competitor's equally low price. Sometimes he takes a short-cut by saying that the discrimination must be justified by the competition—meaning, of course, by the good faith meeting of a competitor's lower prices. At page 753 he uses the phrase "whether the competition justified the discrimination" plainly meaning whether the competition was of the kind (*i. e.*, specific price offers by competitors to particular customers of respondent) which excused and exonerated the discrimination in price. At p. 755 he held that "the competitive situation did not justify respondents' pricing system" meaning, of course, that respondent, adopting a whole pricing system, had not shown that his lower price was in each instance made to particular customers to meet an equally low price offered them by competitors. "The respondent must justify the discrimination", "The discrimination must be justified by the competition", "The competition must justify the discrimination",—all mean that the affirmative showing allowed by the proviso to Section 2(b) justifies the discrimination and is a complete defense to the charge.

* 324 U. S. 748(3), 750(2), 751, 753(2), 754, 755, 756 and 759.

The opinion below is also in conflict with the *per curiam* opinion of the Court of Appeals for the Second Circuit in *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 1945, 148 F. 2d 378 (cert. den. 326 U. S. 734, reh. den. 326 U. S. 809), where Judges L. Hand, A. N. Hand, and Clark reviewed and interpreted Sections 2(a) and (b) and said, at page 379, that even where it appears that a seller

> "* * * has lessened, or prevented, competition, the proviso of § 2(b) will still excuse him, if he can show that his lower price did not undercut his competitors, but merely 'met' their 'equally low price.' In short, that is a defense to the violation of § 2(a). This is as we interpret § 2(a) and § 2(b), when read together."

The decision below also appears to be in conflict with that of the Court of Appeals for the Sixth Circuit in *General Shale Products Corp.* v. *Struck Construction Co.*, 1942, 132 F. 2d 425, at 429 (cert. den. 318 U. S. 780).

In *Federal Trade Commission* v. *Morton Salt Co.*, 1948, 334 U. S. 37, this Court referred to the *Moss* case with approval. At page 43, it likewise classified the good faith meeting of a lower price as a "justification" as follows:

> "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price *could be justified* by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, *or by reason of the seller's good faith effort to meet a competitor's equally low price.*" (Emphasis ours.)

The Court thus places justification by reason of a seller's diminished costs, etc., in the same category as justification by reason of the seller's good faith effort to meet a com-

petitor's equally low price, *i. e.*, in the category of a complete defense to a charge of price discrimination.

Again, in the *Cement Institute* case, 1948, 333 U. S. 683, this Court, at page 725, said:

> "Section 2(b) permits a single company to sell one customer at a lower price than it sells to another if the price is 'made in good faith to meet an equally low price of a competitor.' But this does not mean that § 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act 'speaks only of the seller's "lower" price and of that only to the extent that it is made in "good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.' *Federal Trade Comm'n.* v. *Staley, supra,* at 753."

The holding that injury to competition at any level will nullify the affirmative showing of good faith in meeting an equally low price of a competitor introduces a notable discrepancy when applied to Section 2(e) cases (discrimination in services or facilities). The proviso to Section 2(b) is specifically applicable to 2(e) cases (*Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 1946, 2 Cir., 156 F. 2d 132; semble *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 1939, 3 Cir., 106 F. 2d 667). But injury to competition is no element of the offense in 2(e) cases, and the absence or presence of injury to competition is immaterial. Thus the very same proviso to Section 2(b) which provides a complete defense in 2(e) cases affords only a conditional or rebuttable defense in Section 2(a) cases according to the decision below. This inconsistency has been adverted to by many papers on this subject, *e. g.*, Austern, H. Thomas, "Required Competitive Injury and

Permitted Meeting of Competition", Robinson-Patman Act Symposium, 1947 C. C. H. p. 63 at pp. 76, 86-7.

The court below, in interpreting Section 2(b), set forth the statement of the Chairman of the House Conferees on the Floor of the House when the Bill was presented (R. 5300-1). If recourse to Congressional proceedings is appropriate notwithstanding the clear language of the Act, we submit that the brief summarization of Congressional action contained in the *Staley* case (324 U. S. 752-3, *supra* p. 23), which refers to the Chairman's statement, is adequate and is about all that can rightly be gleaned from the admittedly confused* record. Furthermore, if construction can be aided by the Congressional discussions, we call attention to the remarks of Representatives Patman, 80 Cong. Rec. 8231, Gilchrist, idem 8241, Celler, idem 8117, Boileau, 8124, McLaughlan, 8229, Culkin, 8238, and particularly Patman, idem 8235, where he explains the House provision, finally adopted, as follows:

> "The phrase 'equally low price' means the corporate chain will have the right to compete with the local merchants. They may meet competition, which is all right, but they cannot cut down the price below cost for the purpose of destroying the local man.
>
> Mr. Cooper of Ohio: What does the gentleman's proviso mean?
>
> Mr. Patman: It means they may meet competition, but not cut down the price below cost. It means an equally low price but not below that. It permits competition, but it does not permit them to cut the price below cost in order to destroy their competitors. * * *"

The Senate's understanding of the Conference Report is shown by the following colloquy between Senators Vandenberg and Van Nuys, who presented the Conference Report in the Senate:

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* Raoul Berger and Abraham Goldstein in 44 Illinois Law Review 315, p. 322; 62 Harvard Law Review 1249, 1251.

"Mr. Vandenberg: * * *.

"The fact has been called to my attention that Section 3 of the bill, as agreed upon in conference, makes certain discriminations punishable by fine and also subject to treble damages, while similar discriminations under section 2(b) would be subject to rebuttal by showing, for instance, that a reduced price was made in good faith to meet an equally low price of a competitor. In other words, it is asserted to me that the defense allowed under section 2(b) is not permitted under section 3, although the act or the offense would be the same.

"Mr. Van Nuys: I think the Senator is mistaken there. The proviso to which he refers is simply a rule of evidence rather than a part of the substantive law. If a prima facie case is made against an alleged unfair practice, the respondent may rebut the prima facie case by showing that his lower prices were made in good faith to meet the prices of a competitor. That is a rule of evidence rather than substantive law." (80 Cong. Rec. 9903.)

We repeat that the summarization of legislative intent set forth in the *Staley* case, *supra* p. 27, is a fair review of the conflicting ideas and purposes of individual legislators and of the synthesis of such divergencies into the language of Section 2(b).

The position of the Commission in this case, emasculating the good faith defense under Section 2(b), is a complete reversal of its former treatment of the defense:

First: In price discrimination cases the Commission habitually added saving clauses to its cease and desist orders preserving the right of respondents in good faith to meet equally low prices of competitors (*e. g., Bausch & Lomb Optical Co.*, 1939, 28 F. T. C. 186; *Anheuser-Busch, Inc.*, 1940, 31 F. T. C. 986). Subsequent to the original Findings in this case, it inserted the same saving clause in the *Ferro-Enamel* case, Feb. 26, 1946, 42 F. T. C. 36.

Second: In the *Cement Institute* case, 1948, 333 U. S. 683, objection was made to the form of the order forbidding an "individual cement producer from selling cement at delivered prices such that its net return from one customer will be less than from another, even if the particular sale be made in good faith to meet the lower price of a competitor" (p. 727). But this Court said that "The Commission disclaims that the order can possibly be so understood. Nor do we so understand it."

Third: In 1941, Walter B. Wooden, Assistant Chief Counsel, and Hugh E. White, Examiner, Federal Trade Commission, filed a paper entitled "An Analysis of the Basing-point System of Delivered Prices, etc." with the Temporary National Economic Committee of the Seventy-Sixth Congress, 1941, published as Monograph 42, where at page 139 they say:

> "From its enactment, in 1914 until its amendment in 1936, the Clayton Act specifically safeguarded the right of a seller to discriminate in price for various reasons, among them being discrimination in good faith to meet competition. *The amended Act now safeguards the right of a seller to discriminate in price in good faith to meet an equally low price of a competitor; but he has the burden of proof on that question.* This right is guaranteed by statute and could not be curtailed by any mandate or order of the Commission. The Commission has never proposed that this right be disturbed by amendment of the statute. *The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack.*" (Emphasis ours.)

Until the instant case there was not the least doubt but that the good faith defense under Section 2(b) was full and complete and was unqualifiedly sanctioned by the administrators of the statute.

The present official stand of the Commission is anoma-

lous. In response to written questions addressed to the Commission by Senator Johnson, Chairman of the Subcommittee on Trade Policies of the Senate Interstate and Foreign Commerce Committee, Commissioner Davis, with concurrence of Commissioners Ferguson and Ayres, responded as follows.

> "Question 37. Does the Clayton Act permit sellers to meet competition in good faith?
>
> "Answer. In the ordinary case, the answer is 'Yes', since ordinarily competition is not injured by this type of discrimination. As to the rare instance in which an injury to competition appears, the interpretation of the statute is squarely before the courts in the Standard Oil case, in which decision is now pending.
>
> "Question 38. Do you believe that meeting competition in good faith should be a defense to a charge of price discrimination under the Clayton Act?
>
> "Answer. Yes.
>
> "Question 39. Where a seller in good faith reduces his price to meet the lower price of a competitor, do you believe he should be permitted to meet that lower price, when he does so in good faith, even if his doing so may cause an injury to a competitor, or to a competitor of his customer?
>
> "Answer. Yes. If good faith is present, injury to competition will be rare; and in general the policy of the law should not discourage active competition by preventing the meeting of competition in good faith." (Emphasis ours.)*

To the same effect is the testimony of Robert B. Dawkins, Associate General Counsel, who testified:

> "The Commission has publicly indicated that it would see no objection to a permanent change in existing law that would make the meeting of an equally low

* Hearings Before Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess., Jan. 24, 25, 26, and Feb. 18, 1949 (U. S. Gov't. Printing Office, 1949), pp. 274-5.

price of a competitor in good faith a full defense in price discrimination cases.'"*

On June 9, 1949, E. L. Davis, acting chairman of the Commission, wrote to Congressman F. E. Walter, Chairman Subcommittee of the House Committee on the Judiciary, that:

"* * * all of the Commissioners believe that on balance it would be preferable to make the good faith meeting of competition a complete defense."**

The Commission in this case thus stands for a strained and unnatural construction of the proviso to Section 2(b) which it confesses does not accord with the policy of furthering competition by encouraging the meeting in good faith of the equally low price of a competitor and which, it also confesses, should be straightway amended by the Congress.***

While the Commission officially strives to ride two horses going in opposite directions, members of its staff have not been reluctant publicly to express disagreement with its position in the instant case. Allen C. Phelps, Assistant Chief Trial Counsel and Chief of Export Trade Division, Federal Trade Commission, testified before the Senate Trade Policies Committee on January 25, 1949, as follows regarding the Commission's stand on Section 2(b) in the court below:

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* Hearings before Senate Judiciary Committee on S. 1008, 81st Cong., 1st Sess., March and April, 1949, p. 72.

** Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949 (U. S. Gov't. Printing Office, 1949), p. 61.

*** Moreover, as appears above, the Commission has failed to explain why the injury to competition which they say will render the defense unavailable occurs only in "rare instances" and not in every price discrimination case.

"This position, if upheld in the courts, in my judgment will effectively and completely erase Section 2(b) from the Robinson-Patman Act."*

And Austin H. Forkner, Attorney for the Federal Trade Commission, after pointing out that the good faith meeting of a lower price of a competitor under the proviso to Section 2(b) should apply to Section 2(f) cases (*i. e.*, those brought against persons knowingly inducing or receiving an unlawful discrimination in price), said:

"But in addition to the defenses on the merits, a respondent under Section 2(f) has a number of possible justifications under Section 2(a) which the law concedes as *tolerances for discriminations which are otherwise unlawful.* They admit the discrimination and excuse it. This is in the nature of a confession and an attempt to avoid the consequences. A respondent must prove affirmatively the justification he advances since he has, in effect, admitted a prima facie case against himself on which an order to cease and desist may issue. (Emphasis theirs.)

"Now he can seek to show that because he has conformed to the law, by proving justification, the order should not issue. *The permitted justifications* may be briefly noted as (1) a cost justification, (2) lower prices due to changing market conditions, and (3) *or the meeting of an equally low price of a competitor.* This reasoning follows the nine or more Commission's Cease and Desist Orders issued against respondents under Section 2(f) of the Act."** (Emphasis ours.)

The official attitude of the Department of Justice, which has the major responsibility for the over-all coordination of the antitrust laws, is also publicly opposed to that of the

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* Hearings Before Subcommittee of Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess. (U. S. Gov't. Printing Office, 1949), p. 66.

** Speech entitled "The Significance of Section 2(f)," Robinson-Patman Act Symposium, 1948 (Commerce Clearing House), pp. 66, 80, 81.

Commission. The Department maintains that the good faith defense of meeting the equally low price of a competitor under Section 2(b) not only should be, but is, a complete defense. Assistant Attorney General Herbert A. Bergson, testifying for the Department before the Senate Trade Policies Committee January 25, 1949, stated:

> "The Section [2(b)] presently permits sellers to justify otherwise forbidden price discriminations on the ground that the lower prices to one set of buyers were made in good faith to meet the equally low prices of a competitor."*

In a formal report dated February 25, 1949, on behalf of the Department to the Senate Interstate and Foreign Commerce Committee concerning Senate Bill 236 to amend the Clayton Act, signed by Peyton Ford, the Assistant to the Attorney General, this statement is repeated verbatim.** It is therefore the studied view of the Department of Justice that, without limitation or qualification, Section 2(b) presently permits sellers to justify otherwise forbidden

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* Hearings Before Subcommittee of Senate Committee on Interstate and Foreign Commerce on S. 236, 81st Cong., 1st Sess., Jan. 24, 25, 26, and Feb. 18, 1949 (U. S. Gov't. Printing Office, 1949), p. 77. See also Bergson's testimony before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong., 1st Sess., June 8 and 14, 1949 (U. S. Gov't Printing Office, 1949), where he said at p. 12: "First, we would recommend deletion of the * * * Kefauver Amendment. * * * Insertion of this phrase in the bill has the effect of retaining the rule of *Standard Oil Co.* v. *F. T. C.* (173 F. 2d 210), a decision by the Court of Appeals for the Seventh Circuit which held that good faith competition is not a defense where the effect would be to lessen competition. While we recognize the competitive problem which arises when one purchaser obtains advantages denied to other purchasers, we do not believe the solution to this problem lies in denying to sellers the opportunity to make sales in good faith competition with other sellers."

** *Id.*, p. 320.

price discriminations on showing that the lower prices to one set of buyers were made in good faith to meet the equally low prices of a competitor.

Nor is this interpretation a new thing in the Department of Justice; for in the *International Salt* case, 1947, 332 U. S. 392, where the charge was unreasonable restraint of trade and monopoly by requiring exclusive handling of lessor's products in leased machines, objection was raised that the decree prevented the lessor from reducing rentals in some sections of the country to compete with lower rentals offered by competitors, and the Court said at p. 399:

> "Of course, the Clayton Act itself permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose."

Subsequently the trial court amended the decree to allow such meeting of competitors' prices (C. C. H. Trade Regulation, Par. 61,128).

Since the issuance of the complaint in this case, students of the subject have almost uniformly condemned the Commission's artificial construction of Section 2(b).* The

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* Austern, H. Thomas, "Required Competitive Injury and Permitted Meeting of Competition," Robinson-Patman Act Symposium, 1947, Commerce Clearing House, pp. 63-87; Crowley, P. J. B., "Equal Price Treatment Under The Robinson-Patman Act," 95 University of Pennsylvania Law Review, February, 1947, pp. 306-343; Haslett, John T., "Price Discriminations and Their Justifications Under The Robinson-Patman Act of 1936," 46 Michigan Law Review, February, 1948, p. 450; McCollester, Parker, "Section 2(b)," Robinson-Patman Act Symposium, 1946, Commerce Clearing House, pp. 23-35; McCollester, Parker, "Suggestions as to Certain Amendments," Robinson-Patman Act

acceptance of the Commission's position by the court below has been analyzed and disapproved by the commentators and writers in the Law Reviews which have covered this subject.*

In conclusion: —the instant case will necessarily determine whether the good faith defense of the proviso of Section 2(b) is *always* available or *never* available. The Commission's 1948 Statement of Policy recognizes that there is no middle ground:

> "Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discriminations which injure or prevent competition, unless either the price differences can be justified by differences in cost or else the price reductions have been made in good faith to meet the equally low prices of competitors.'"

and in the footnote:

> "'In a case now pending before the court in the seventh circuit (*Standard Oil Company* v. *F. T. C.*), the Commission is now seeking to ascertain whether or not, where there is proof that the *statutory injury* to competition resulted from a discrimination in price,

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Symposium, 1948, Commerce Clearing House, pp. 133-140; Shniderman, Harry L., "'The Tyranny of Labels'—A Study of Functional Discounts Under The Robinson-Patman Act," 60 Harvard Law Review, April, 1947, p. 571; Van Cise, Jerrold G., "Functional Prices," Robinson-Patman Act Symposium, 1947, Commerce Clearing House, pp. 89-104. Contra: Patman, Wright, 1938, "The Robinson-Patman Act," Chapter 3, "Price Discrimination to Meet Competition."

*62 Harvard Law Review 1249, May, 1949; Adelman, M. A., "Integration and Anti-Trust Policy," 63 Harvard Law Review 27, at 60-74, November, 1949; Berger, Raoul, and Goldstein, Abraham S., "Meeting Competition under The Robinson-Patman Act," 44 Illinois Law Review 315-330, July-Aug., 1949; University of Illinois Law Forum, No. 3, p. 541, 1949. Contra: 49 Columbia Law Review 863, June, 1949.

this discrimination is nevertheless lawful if it arose by meeting competition in good faith.'" (Emphasis ours.)

Since "statutory injury to competition" will result from every discrimination in price if sufficient in amount to give a price advantage or to affect the resale price (as said in the *Morton Salt* case, 1948, 334 U. S. 37 at pp. 46, 47, 50), it follows that the good faith defense will be unavailable in *every* case if it is unavailable in the instant case.

II.

Section 2(b) as construed by the court below does not conform to constitutional standards of definiteness and reasonableness.

The construction of Section 2(b) adopted by the Commission and the court below encounters constitutional obstacles which can, and should be, avoided by taking instead the natural and generally accepted meaning of the statutory language. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U. S. 1, 30; *Ex Parte Endo*, 1944, 323 U. S. 283, 299; *Anniston Mfg. Co.* v. *Davis*, 1937, 301 U. S. 337, 351.

As construed below, the Act lacks that standard of definiteness which is required by decisions of this Court. Nor does it meet the requirement that a law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and appropriate relation to the objects sought to be attained.

Indefiniteness.

Civil offenses, as well as criminal, particularly where a treble damage penalty may result, must be defined in a statute in terms which can, within reasonable limits, be

* CCH, Trade Regulation, Par. 10,412, p. 10,177.

understood and complied with.* *Small* v. *American Sugar Refining Company*, 1925, 267 U. S. 233, *Winters* v. *New York*, 1948, 333 U. S. 507.

Manifestly, a statutory provision which operates, as does one affecting the right to meet a competitor's lower price, upon the very nerve center of competitive activity, must afford to the businessman a reasonable concept of what is permissible and what is forbidden. The businessman, at the moment when he is confronted with a lower competitive offer, must be aware of the legal criteria which determine his right to meet the lower price. Certainly he may not be required to act at his peril, subject to a subsequent application of the statute by the Commission, or the court (in a treble damage suit), which he could not reasonably anticipate or of which his lawyer could not advise him. The Commission's novel application of the statute in this case, which was approved by the court below, deprives the businessman of any readily understandable guide.

The greatest confusion which the interpretation below introduces into the Act is its nullification in effect of the proviso to Section 2(b) which will "effectively and completely erase Section 2(b) from the Robinson-Patman Act" (*supra*, pp. 31-2). This transforms the proviso from an oasis to a mirage.

Faced with the necessity of disavowing an interpretation which would render the proviso entirely futile in all price discrimination cases and at the same time to justify to the Congress its unavailability in the instant case, the Commission recently tried to explain that the defense will be nullified only in "rare" instances (*supra*, p. 30). It is significant that the Commission, in explaining to the Congress its attitude toward the Section 2(b) defense in

* "Due Process Requirements of Definiteness in Statutes," 62 H. L. R. 77, reviews the tests of requisite clarity together with the applicable precedents.

the instant case, makes no mention of the theory which it urged upon, and which was accepted by, the court below, namely, that the good faith showing under the proviso to Section 2(b) is unavailable whenever there is "actual injury to competition at the retail level." While the court below was obviously impressed with this theory, neither it nor the Commission has pointed to anything in the statute or the legislative history which even faintly suggests that the statute is concerned with more than one standard of injury or makes any distinction between injury to competition at the retail level and injury to competition at any other level.

But the Commission's "rare instance" explanation still leaves the statute hopelessly vague because the phrase is incapable of reasonably exact definition. The only attempt of the Commission to define the "rare instance" in its answers to the Congressional inquiries (*supra*, p. 30) is found in the bare assertion that when discriminations in price are made between competing purchasers in good faith to meet an equally low price of a competitor, injury to competition will be "rare." We can understand the contention that discriminations to meet an equally low price of a competitor will *never* injure competition because such good faith meeting of a competitor's lower price enhances competition; and that such good faith meeting of price will *never* injure the purchaser discriminated against because the so-called "favored" buyer was destined in any event to receive the equally low price offered him. But this leaves no room for the "rare instance" which remains entirely undefinable.*

While this most recent attempt to rationalize the Commission's inconsistent position leaves the Act too vague,

* The Commission itself is bewildered. While it asserts to the Congress that discriminations made in good faith to meet an equally low price of a competitor will rarely cause injury to competition, it states in *Minneapolis-Honeywell Regulator Company*, CCH Trade Regulation Service, 1948,

the abandoned explanation which the Commission promulgated in its Findings rendered it utterly confusing.

The Commission in its Findings asserted that the good faith meeting of an equally low price of a competitor is not a defense "where competitive injury is affirmatively shown" (R. 5180; see also 5179, 5181, 5182). This imports another indefinable phrase: Does "competitive injury affirmatively shown" mean the actual injury that has occurred in the past or does it mean injury that "may" occur in the future? The only injury which is pertinent in a price discrimination case is the statutory injury defined in the *Morton Salt* case (*supra*, p. 21): that which inheres in giving a price advantage to one of two competing customers "sufficient in amount to influence resale prices." Proof that the recipient of the price advantage actually used such advantage to lure away customers by cutting prices or rendering better service was held to be unnecessary. Surely such redundant evidence of loss of customers and patronage—although readily procurable in every price discrimination case where the discrimination is more than *de minimis*—cannot be sufficient to deprive one of the right in good faith to meet an equally low price of a competitor. Therefore, whether the phrase "competitive injury affirmatively shown" is intended by the Commission to be synonymous with the statutory injury defined in the *Morton Salt* case or whether it is intended to be synonymous with loss of custom and patronage, it can, in either case, serve only to becloud the issue.

This proceeding was launched to determine whether price discriminations made in good faith to meet competitors' prices are lawful when there is "statutory in-

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par. 13,675, p. 12,948, that the very evidence establishing the good faith defense of meeting an equally low price of a competitor may constitute in and of itself proof of injury to competition; that the mere retention of customers who received the lower price constitutes an adverse effect upon the competitor who sought to woo them away.

jury" to competition (Statement of Policy, *supra*, p. 35). Since "statutory injury" is present in every price discrimination forbidden by Section 2(a), it is apparent that the Commission seeks power to nullify the Section 2(b) defense in every case but intimates it will exercise the power only in "rare instances," *i. e.*, in selected cases and—for aught that appears—selected on the basis of its own whim.

Construed as a complete defense Section 2(b) is unambiguous and meaningful. Construed as less than a complete defense the proviso will be vague and meaningless.

Unreasonableness.

As interpreted below, the Act would also be so unreasonable and capricious as to offend the standards of due process. *Mayflower Farms* v. *Ten Eyck*, 1936, 297 U. S. 266, 274.

Whatever might be said about the right to "meet competition" under the Clayton Act prior to the Robinson-Patman Amendment, there is no basis following that Amendment and following the *Staley* and *Cement* cases for any suggestion that the good faith meeting of an equally low price of a competitor would bring about any of the evils at which the statute is aimed. The Commission and the courts have it entirely within their power to prevent predatory practices, monopolization and other abuses (*supra*, p. 23) by an affirmative finding of bad faith, or by a finding that the purpose was not to meet equally low individual competitive price offers to specific customers. No such obnoxious elements are present here. Hence the Commission did not find, and on the overwhelming evidence could not have found, bad faith.

Where it is assumed that there were no such abuses and that the lower price was made to meet equally low prices of competitors in order to retain customers of long standing, it would seem unreasonable and arbitrary in and of itself to abrogate the defense. The meeting of the lower

price of a competitor is of the very essence of our competitive system, heretofore considered fundamental. A state statute which in terms denied the defense of good faith meeting of competition was held unconstitutional by this Court (*Fairmont Creamery Company v. Minnesota*, 1927, 274 U. S. 1) and it seems to us that subsequent cases approving state statutes fixing uniform prices have not destroyed the vitality of the *Fairmont* case with respect to the right to meet competitors' prices. State statutes, which are in effect local Robinson-Patman Acts, almost invariably recognize the right in good faith to meet an equally low price of a competitor.*

It must always be borne in mind that the restrictions imposed by the Commission on petitioner and its jobber customers in this case cannot be imposed on many of petitioner's competing suppliers and the jobbers supplied by them. For example, the court below recognizes that suppliers who distribute in a given area at one price only through jobbers are not subject to the Robinson-Patman Act nor to the restrictions imposed in the instant case (R. 5304). Other suppliers who are beyond the reach of the Commission are the very substantial number who distrib-

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* 118 A. L. R. 486; 128 A. L. R. 1120; 163 A. L. R. 1124 and annotations.

Such statutes, without apparent exception, provide an exemption for the good faith meeting of competitive prices either (1) by express statutory provision or (2) by requiring wrongful intent,—which is incompatible with good faith. *Pennsylvania* and *New Jersey* statutes which permitted the good faith meeting of a competitor's "legal" price were held invalid because of the indefiniteness of the term "legal" (*Commonwealth v. Zasloff*, 1940, 338 Pa. 457, 13 A. 2d 67; *Lief* v. *Packard-Bamberger & Co.*, 1939, 123 N. J. L. 180, 8 A. 2d 291). *Kentucky* and *Washington* statutes are interpreted to afford a meeting competition defense. *Minnesota* amended the statute held unconstitutional by this Court in the *Fairmont* case by adding a meeting competition defense whereupon the statute was upheld by the State Court (idem).

ute gasoline refined in Michigan from oil produced in Michigan and whose sales in Michigan are therefore not in commerce. Other suppliers not subject to the restrictions of the Order are those who might be able to prove that their lower price to jobbers represents only due allowance for savings in cost of sale and delivery to the jobbers in larger quantities or by different methods than to retailer customers in the same area. The effect of the denial of petitioner's right to meet competitors' prices must be surveyed in this background.

Surveyed in this background, the Commission's denial of the good faith defense in the present case is particularly oppressive not only because of the fact that petitioner's so-called discriminatory prices were made in good faith solely to retain its own customers of long standing, but also because these customers all belonged to a distinct class of buyers, so recognized throughout the industry. It was not contended that petitioner's prices to the four jobbers were lower than those at which jobbers of comparable brands generally purchased their supplies. Nor was it contended that petitioner's prices to its retail service station customers were below the level of prices paid generally by retail service stations which purchased in tank wagon quantities for resale. Furthermore, it must be conceded that the Clayton Act cannot prevent these four jobbers or any jobbers from obtaining comparable gasoline from other suppliers at equally low or even lower prices than petitioner's, provided only that such other suppliers distribute in Detroit through jobbers only or distribute only Michigan produced and refined gasoline. It must also be conceded that these jobbers, or any jobber buying from such a supplier, would be at liberty to buy comparable gasolines at a tank car price as low as or even lower than petitioner's tank car price, regardless of whether they resell it at wholesale or at their own service stations, and regardless of whether they maintain the

prevailing tank wagon prices on their resales at wholesale. Such other supplier could legally sell and the jobbers could legally buy at tank car prices representing as great or even a greater tank car discount than petitioner afforded. Thus it cannot be said that denial of the right to meet competitors' prices in this case will accomplish the objectives of the Order.

It is patent that the Commission's Order strikes primarily at dual distribution in the same territory (see Point III, *infra*, p. 45). It is only because petitioner sells to two classes of customers in the same area, admittedly at the going price to each of them, that petitioner, to avoid the restrictions of Paragraph 6 of the Order, may find it necessary to discontinue dealing with one or the other. The business abandoned by petitioner can be taken over by other suppliers on the same terms and conditions. A legislative enactment in terms barring such dual distribution and pricing would seem to be of doubtful constitutional validity in the absence of a legislative finding, express or implied, that such dual distribution is injurious to the competitive system (cf. *Standard Oil Company of California*, 1949, 337 U. S. 293, 311-312). But here we have no such legislative enactment and no such legislative finding. The unreasonableness of holding that petitioner is deprived of the right in good faith to meet an equally low price of a competitor must be viewed in the light of these circumstances. To deny this right in any case is questionable; but to deny it in this case where the effect of the denial will be without benefit to anyone is, we submit, arbitrary and capricious.

True, the Commission has made a finding of injury to competition, but this finding must also be viewed in the light of the facts in this case. The retention of the four jobber customers by the petitioner in the face of the equally low or lower offers made to them by competitors can have

but little, if any, effect on the over-all competitive picture. Surely if the right in good faith to meet a competitor's equally low price should be preserved in any case, it is worthy of preservation in the instant case.

As shall be shown in Point III, dual distribution may be maintained in the same region under the Order only if suppliers are willing to impose and jobbers are willing to suffer controls which may become competitive straitjackets. What purpose can be served in requiring a wholesaler to maintain the dual supplier's tank wagon price when other wholesalers of comparable brands may cut the prevailing tank wagon price with impunity? It seems bootless to toss out the suggestion that petitioner can avoid all price discriminations by selling to jobbers and service stations at the same price when it is obvious that such policy will entail the liquidation of one or the other as customers. Equally bootless is the futile saving clause in the Order (R. 5256) which allows a dual distributor to make a jobber discount representing only due allowance for the suppliers' lesser costs in purveying to jobbers than to service stations: the suppliers' savings will not equate to the jobbers' expense of performing the wholesale function plus the profit necessary for existence.

This case typifies the dangers of law-making by an administrative agency in a particular case without full inquisition of legislative character. Arbitrary damage will be inflicted on various classes of distribution without benefit to the economy and without accomplishment of the purposes of the Act.

III.

Paragraph 6 of the Order.

Paragraph 6 of the Order, as amended by the court below, prevents petitioner from selling to its jobbers in their wholesaling capacity at a price lower than petitioner charges its retail service-station customers (where the jobbers' retail customers and petitioner's retail customers are in competition with each other) where such jobber "to the knowledge of [petitioner] or under such circumstances as are reasonably calculated to impute knowledge to [petitioner] resells such gasoline or intends to resell the same to any of its said retailer-customers at less than [petitioner's] posted tank-wagon price, or directly or indirectly grants to any such retailer-customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to a retailer." Petitioner can avail itself of two options:

First: To cease selling to its jobbers in their wholesaling capacity and at the same time to its retailers in the same locality (*i. e.*, to retailer customers who compete with the retailer customers of the jobber), in which event the Paragraph has no application; or

Second: If petitioner continues to sell to its wholesalers and retailers in the same territory, either (a) to discontinue "selling to wholesalers at a price different than that made to retailers" (R. 5304)*; or (b) to see to it that the wholesaler maintains petitioner's tank

* Op. of court below (R. 5304): "First, discontinue selling to wholesalers at a price different than that made to retailers. The petitioner's three largest competitors in Detroit have found it agreeable to do so. The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified except on the exploitation of a differential in price not justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted, or unjust."

> wagon prices in its resales where "to the knowledge of" petitioner or "under such circumstances as are reasonably calculated to impute knowledge to" petitioner the wholesaler resells or intends to resell at less than petitioner's posted tank wagon prices (R. 5304-5).

This is the first case in which it has been held that a supplier in a given locality who sells to all retailers at a single posted tank wagon price and to all wholesalers in the same territory at a single tank car price is guilty of unlawful discrimination if he knows or ought to know that the wholesaler intends to sell to service stations at a price lower than the supplier sells to its own service station customers in the same territory. By definition, retailers and wholesalers are not in competition with each other; and it has hitherto been thought that a differential in price is not an unlawful discrimination unless granted to purchasers in competition with each other. By definition, the supplier has parted with all title to and control over his product; and it has hitherto been thought that its subsequent disposition was none of his business and should be none of his business. In no other case has a court, either directly or by indirection, required suppliers to distribute in the same territory solely by wholesale or solely by retail; or to charge the same price to wholesalers and retailers; or to establish price maintenance systems by requiring wholesalers to resell to retailers at the supplier's retailer price.

No supplier in his right mind would embark upon a price maintenance system to see to it that the wholesaler maintained the supplier's retailer prices. An agreement by the wholesaler to maintain prices would doubtless be unlawful (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 1911, 220 U. S. 373; *United States* v. *Bausch & Lomb*, 1944, 321 U. S. 707, 721; *United States* v. *U. S. Gypsum Co.*, 1948, 333 U. S. 364, 389). Nor would petitioner be safe in establishing an

espionage system over its jobbers and in "cutting off" any wholesaler who does not maintain them (*Federal Trade Commission* v. *Beech-Nut*, 1922, 257 U. S. 441). Section 11 of the Clayton Act (15 U. S. C. sec. 21) explicitly provides: "No order of the [Federal Trade] Commission * * * shall in any wise relieve or absolve any person from any liability under the antitrust laws."

Apart from the effect upon petitioner, who might find it necessary to give up customers of long standing, and apart from the effect upon the public if major company suppliers should be not merely authorized but required to enforce the maintenance of their resale prices by their jobber customers, Paragraph 6 places the jobbers in a particularly unfortunate situation. Jobbers such as petitioner's customers in this case, who may have had long-standing relations with their suppliers and who may have spent many years and devoted their major efforts to building up good will for the brand designation of their respective suppliers, will, if this case be sustained, face the unhappy choice (1) of maintaining in their wholesale operations their suppliers' tank wagon prices although many of their competitors will not be hampered by similar price restrictions; or (2) of changing suppliers in order to avoid the restrictions brought about by this case; in so doing, of course, the jobber will lose the benefits of the good will that he has established for the trade-name upon which he built up his business, and will have to start afresh to build up trade acceptance of a new product perhaps by cutting prices to induce customers to try the new brands of gasoline.

As always when an administrative body engages in the complicated business of law-making in a particular case without comprehensive hearings and investigations, the Order, even as fixed up by the court below, fails to make provision for conditions that may arise in the future as

they have arisen in the past. Suppose a price-cutter should approach a jobber's service station customer with the offer of a lower price, suppose the jobber is faced with losing that customer or of meeting the cut price—does the Order permit him to do so? It does not—petitioner must "cut him off." Suppose an enterprising competitor should approach one of these jobber service station customers with an offer to build cement runways or paint buildings or the like, and suppose the jobber is faced with losing that customer or of meeting such competitive offer—does the Order permit him to do so? It does not. Under no circumstances may petitioner allow him to sell to any service station customer at less than petitioner's tank wagon price "or directly or indirectly grant to any such retailer customer any discounts, rebates, allowances, services or facilities having the net effect of a reduction in price to the retailer." It seems obvious in this highly competitive industry that competitors of these jobbers will quickly take advantage of the competitive strait-jacket in which they are placed by Paragraph 6 and will lure away their customers one by one.

As will be seen in our next point, interstate commerce was held to have ended upon delivery of the gasoline to petitioner's customers. The jobbers in this case are therefore on the lower court's theory not in commerce and therefore not subject to the Commission's jurisdiction. But the Commission, by Paragraph 6 and through petitioner as an enforcing agency, will exercise control over the terms and conditions of resales at wholesale by a limited number of jobbers, which resales are held not to be in interstate commerce. The Commission will have the power of life and death over those who, on its own theory, are not in commerce.

Paragraph 6 as modified and its amazing tendencies towards price maintenance and profit control has met wide-

spread disapproval (Harry L. Shniderman, "The Tyranny of Labels," 60 Harvard Law Review 571; Jerrold G. Van Cise, "Functional Prices," Robinson-Patman Act Symposium, 1947, published by Commerce Clearing House, p. 89; John T. Haslett, "Price Discriminations and Their Justifications Under the Robinson-Patman Act of 1936," 46 Michigan Law Review 450; 1949 the University of Illinois Law Forum No. 3, p. 541; M. A. Adelman, "Integration and Anti Trust Policy," 63 Harvard Law Review 27, pp. 60-77).

Paragraph 6 constitutes an "extraordinary reversal of position by the Commission" (Van Cise, *supra*). As pointed out by Commissioner Mason dissenting (R. 5260-3), Congress refused to abolish functional pricing. The Commission has been opposed to price maintenance programs and for that reason has opposed the passage and continuance of the Miller-Tydings Act (*e. g.*, Report of Federal Trade Commission on Resale Price Maintenance, 1946). Yet the Commission has seized upon a relatively minor incident in this case—sales by Citrin to Langer-Cohn and one other service-station customer at 1¢ and ½¢ a gallon below petitioner's regular tank wagon price—to promulgate Paragraph 6 with its "sweeping implications of private resale price maintenance or public profit margin control" (Shniderman, *supra*).

IV.

The Commission was without jurisdiction because none of the purchases involved in the alleged discrimination was in commerce.

The Commission was without jurisdiction of this case unless "either or any of the purchases" of gasoline by the four jobbers or the 358 service stations was "in commerce" (Sec. 2 (a), Appendix B, p. ii).

The court below on the analogy of *Stafford* v. *Wallace*, 1922, 258 U. S. 495, and *Swift* v. *United States*, 1905, 196 U. S. 375, held that the purchases were in commerce. We respectfully submit that these two cases are not analogies for two reasons: first, because both cases involved a statute wherein the Congress had exercised its full power over commerce, whereas in the instant case the Congress limited the Commission's jurisdiction to purchases "in commerce" and did not extend the Commission's jurisdiction to purchases "affecting commerce"; and, second, because the *Stafford* and *Swift* cases involved the stockyards and packing plants in so far as they affected the flow or stream of commerce from many states to the Stock Yards in Illinois and out of Illinois to many other states, whereas the statute in the instant case does not cover purchases which merely affect the flow of commerce—it raises the question whether interstate transportation ended at the Marine Terminal in Michigan from which no gasoline was exported to other states.

This Court has frequently pointed out the distinction between the full exercise of governmental power which extends to matters "affecting commerce" and the limited exercise of power by regulation of activities "in commerce." In *Federal Trade Commission* v. *Bunte Bros.*, 1941, 312 U. S. 349, which was a case under Section 5 of the Federal Trade Commission Act employing the phrase "an-

fair methods of competition in commerce," the Court said at page 355:

> "* * * This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."*

The issue to be determined is whether any of the purchases involved in this case was "*in commerce*" not whether petitioner was engaged in commerce nor whether these purchases *affected* commerce.

We believe this case is analogous to the third category of shipments discussed in *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U. S. 564. That case, like this one, involved out-of-state shipments into a warehouse with subsequent sale and distribution entirely within the importing state. The Court first said (pp. 567-8) that a mere temporary pause at a warehouse does not constitute termination of an interstate journey. Second, the Court held (pp. 568-9) that an interstate movement does not terminate when goods pause at a warehouse if "there is a practical continuity of movement from the manufacturers or suppliers without the state" due to the shipment in fulfillment of special orders for the particular merchandise; for example, when the merchandise is "printed at the mill with the name of

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* Other cases in which this distinction has been recognized and commented upon include: *Ward Baking Co.* v. *Federal Trade Commission*, 1920, 2 Cir., 264 Fed. 330; *Gerdert* v. *Certified Poultry & Egg Co., Inc.*, 1941, Dist. Ct. S. Dist. Fla., 38 F. Supp. 964; *Eddings* v. *Southern Dairies*, 1942, Dist. Ct., E. Dist. So. Carolina, 42 F. Supp. 664; *Lewis* v. *Shell Oil Co.*, 1943, Dist. Ct., N. Dist. Ill., 50 F. Supp. 547; *Polish National Alliance* v. *National Labor Relations Board*, 1944, 322 U. S. 643, 647.

the customer." Third, as to goods not shipped on special order and not warehoused as a mere "ritual," the Court said at p. 569:

> *"Finally, the Administrator contends that most of the customers form a fairly stable group, that their orders are recurrent as to the kind and amount of merchandise, and that the manager can estimate with considerable precision the needs of his trade.* It is therefore urged that the business with these customers is 'in commerce' within the meaning of the Act. Some of the instances to which we are referred are situations which we have discussed in connection with goods delivered pursuant to a prior order, contract, or understanding. For the reasons stated they must be included in the group of transactions held to be 'in commerce.' As to the balance, we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside. We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act. It was said in *Swift & Co.* v. *United States*, 196 U. S. 375, 398, that 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' While that observation was made apropos of the constitutional scope of the commerce power, it is equally apt as a starting point for inquiry whether a particular business is 'in commerce' within the meaning of this Act. We do not believe, however, that on this phase of the case such a course of business is revealed by this record. *The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition."* (Emphasis ours.)

To the same effect is the companion case, *Higgins* v. *Carr Bros. Co.*, 1943, 317 U. S. 572.

Under the reasoning of the *Jacksonville* case the interstate aspects of the shipment of petitioner's gasoline into Michigan ceased at the Marine Terminal. The gasoline came to rest there. It was not earmarked and could not have been earmarked for any customer. It was destined solely for distribution in Michigan. There were no contracts in advance of shipment for any definite amounts. The warehousing at the Terminal was not a mere pause in the journey or a mere "ritual": the gasoline remained there for long periods of time, even throughout the winter months.

The lower court's decision that the storage of gasoline at the Marine Terminal differed from the storage of goods in a local warehouse (R. 5297-8) and hence did not constitute an end of interstate commerce is in apparent conflict with the decision of the First Circuit in *Lipson* v. *Socony Vacuum Corp.*, 1937, 87 F. 2d 265, cert. granted 300 U. S. 651, dism. per stip. 301 U. S. 711, which is an oil case in which the facts were similar with respect to the commerce point.*

The lower court's decision also conflicts with the reasoning of *Atlantic Coast Line Railroad* v. *Standard Oil Co. of Kentucky*, 1927, 275 U. S. 257, which held that petroleum products delivered from tankers into storage terminals in Florida became subject to intrastate transportation rates

* It is also in conflict with *Daly* v. *Citrin*, 1943, Dist. Ct., E. Dist. Mich., 53 F. Supp. 876, which dealt with petitioner's storage at the Marine Terminal involved in this case, and with *Nachman* v. *Shell Oil Co.*, 1945, Dist. Ct., Dist. Md., C. C. H. (Trade Regulation), p. 57758, where local storage of gasoline was held to terminate interstate commerce. See also *Crutchfield* v. *Cherry*, 1947, Dist. Ct., W. Dist. Tenn., 7 W. H. (B. N. A.) 1080; *Williams et al.* v. *Bill Mosier's, Inc.*, 1942, Dist. Ct., W. Dist. Okla., 2 W. H. (B. N. A.) 662, in both of which interstate movement of gasoline was held to have ceased at a local storage facility.

and regulations after such storage. In this case it was contended (p. 271):

> "* * * these are continuous streams of oil from Baton Rouge or Tampico into bulk stations in the interior of Florida where it is sold to the customers of the plaintiff, and that its interstate character continues through that entire passage."

It was suggested that the fuel oil was being discharged from the tankers into Standard of Kentucky's storage facilities at the same time that oil was being discharged from the storage tanks into tank cars for distribution, but it was held (p. 271) that such simultaneous inflow and outflow

> "* * * is not at all inconsistent with its being a closing of an interstate or a foreign transportation and a beginning of intra-state distribution for the purposes and business of the plaintiff."

The court considered the pertinency of *Stafford* v. *Wallace* and concluded (p. 273):

> "The use of this authority [*United States* v. *Ferger*, 250 U. S. 199] as a basis for the conclusion in *Stafford* v. *Wallace* clearly shows that the case can not be cited to show what is interstate and what is intrastate commerce in a controversy over rates to determine whether they come normally within the regulation of Federal or State authority."

By the same token the *Stafford* case is not citeable here.

Other cases fully supporting our contention that the interstate movement of gasoline ceased at the Marine Terminal and that both the sales to the jobbers and the sales to the service stations of gasoline delivered out of the Marine Terminal were intrastate sales and therefore not in commerce include *Jewel Tea Co.* v. *Williams*, 1941, 10 Cir., 118 F. 2d 202; *Domenech* v. *Pan American Standard Brands, Inc.*, 1945, 1 Cir., 147 F. 2d 994. In each of these cases und[illegible] facts not distinguishable in principle from

those involved in the instant case, the court held that the interstate phase ended with the storage at the local warehouse.

The false analogy which the lower court has drawn between the instant case and the *Stock Yards* and other cases involving the full exercise of Governmental power over the "stream," "flow" or "course of commerce" is responsible for the failure of the court below to rule that the interstate aspect of transportation ended at the Marine Terminal. It is also responsible for the holding of the court below that the gasoline did not lose its interstate character until it reached the tanks of the service stations and the bulk plants of the jobbers in Detroit (R. 5297-8-9).

But it was never contemplated that the jurisdiction of the Commission should reach thus deeply into local matters. If the principle is allowed to stand, the distinction between "affecting commerce" and "in commerce" is swept away. Employees of the service stations in Detroit engaged in ordering gasoline or assisting in its delivery into the service station tanks will be held to be "employees in commerce" under the "in commerce" provision of the Fair Labor Standards Act contrary, we believe, to the following cases: *Walling* v. *Jacksonville Paper Co.*, 1943, 317 U. S. 564; *Walling* v. *Silver Bros. Co. Inc.*, 1943, 1 Cir., 136 F. 2d 168; *Kantar* v. *Garchell*, 1945, 8 Cir., 150 F. 2d 47; *Daly* v. *Citrin*, 1943, Dist. Ct., E. Dist. Mich., 53 F. Supp. 876; *Crutchfield* v. *Cherry*, 1947, Dist. Ct., W. Dist. Tenn., 7 W. H. (B. N. A.) 1080. In *Walling* v. *Goldblatt Bros.*, 1942, 7 Cir., 128 F. 2d 778, 781, 782, 783, it was specifically pointed out that the "current of commerce" test should not be applied to "in commerce" cases because such fallacious use of the analogy will defeat the intent to leave local affairs to local authorities. If the Congress wished to reach thus deeply into local affairs it could easily have done so by framing the statute in "affecting" commerce language.

It is significant that while the complaint alleged that all of the purchases complained of were "in the course of commerce," neither the Trial Examiner nor the Commission were able to say in so many words that the "purchases were in commerce." The Commission could only find that petitioner was engaged in commerce, that it has at all times maintained a course of trade in commerce and that "In the course and conduct of its business in the Detroit metropolitan area, * * * since September 10, 1936, has regularly supplied gasoline to approximately 358 retail service stations * * *." (R. 5164.) To say the least, this is a curious method of avoiding the necessity of making the simple jurisdictional finding that "the purchases involved in such discrimination are in commerce." Commissioner Mason, dissenting, called attention to this remarkable omission (R. 5268) but the Commission did not rectify it.

Conclusion.

The mutual opposition between the philosophy of the Sherman Act and that of the Robinson-Patman Act has been frequently remarked. The instant case vastly enlarges the area and intensity of conflict. The open disagreement of the Department of Justice with the Federal Trade Commission in this case is attributable to the extent to which the reach of the decision below impinges upon the general antitrust program.

It is possible to reconcile the apparent divergencies so long as the Robinson-Patman Act is held to do away with unjustifiable price discriminations; but it is not possible to reconcile the divergencies if the Act be held to abolish price discriminations made in good faith to meet equally low prices of competitors, particularly where the Commis-

sion finds it necessary to require practices of the type forbidden by the Sherman Act.

Contrary to the over-all antitrust policy, the Commission in this case has attempted to stratify important segments of the distributive system and to establish price controls and uniformity of price structure, despite the rulings of this Court in the *Sugar Institute* and *Gypsum* cases.*

It is, of course, within the province of the Congress to restrict the scope of the Sherman Act in areas where it considers free competition not in the public interest but, until Congress has clearly evinced such an intention, our basic policy manifested by the Sherman Act should remain unchanged. Although the major suppliers of gasoline could undoubtedly in time adjust their operations to eliminate dual distribution, perhaps by taking over the businesses of the jobbers whom they can no longer serve, the principal impact of the Commission's decision will be upon the small businessman, the jobber who has had the misfortune of handling the product of a dual distributor.** Those jobbers who are eliminated or forced to seek a new source of supply or constrained to submit to a competitive straitjacket will not share the equanimity with which the Commission surveyed their unhappy lot.

It is also within the province of the Congress to enlarge the jurisdiction of the Commission to include purchases which merely *affect* commerce; but, Congress having deliberately restricted the jurisdiction to purchases *in* com-

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* *Sugar Institute* v. *United States*, 1936, 297 U. S. 553, 587; *United States* v. *U. S. Gypsum Co.*, 1948, 333 U. S. 364, 397.

** "It would take a skilled intellectual contortionist to consider the *Indiana Standard* case as involving small v. big business" (63 H. L. R. at p. 77).

merce, it is not within the province of the Commission or the courts to disregard the limitation.

For these and other reasons herein stated, the judgment of the court below should be reversed and the Order of the Commission dismissed.

Respectfully submitted,

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APPENDIX A.

Section 2 of the Clayton Act, 38 Stat. 730 (1914), 15 U. S. C., Sec. 13 (1934), Prior to the Robinson-Patman Amendment.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities,*

which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession, or other place under the jurisdiction of the United States,

where the effect of such discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce:

Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of

differences in the grade, quality, or quantity of the commodity sold,

or that makes only due allowance for difference in the cost of selling or transportation, or

discrimination in price in the same or different communities made in good faith to meet competition:

And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

* Indenting, emphasis and paragraphing ours.

APPENDIX B.

Section 2 (a) and (b) of the Clayton Act as Amended by the Robinson-Patman Act June 19, 1936, 49 Stat. 1526; 15 U. S. C., Sec. 13.

SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality,*

where either or any of the purchases involved in such discrimination are in commerce,

where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States,

and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:

Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available pur-

* Indenting, emphasis and paragraphing ours.

hasers in greater quantities are so few as to render differntials on account thereof unjustly discriminatory or prohotive of monopoly in any line of commerce; and the oregoing shall then not be construed to permit differenials based on differences in quantities greater than those o fixed and established:

And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merhandise in commerce from selecting their own customers n bona-fide transactions and not in restraint of trade:

And provided further, That nothing herein contained shall prevent price changes from time to time where in response o changing conditions affecting the market for or the narketability of the goods concerned, such as but not imited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

SEC. 2. (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of **rebutting the prima-facie case thus made by showing** justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination:

Provided, however, That nothing herein contained shall prevent a seller **rebutting the prima-facie case thus made by showing** that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.